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No. 573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOHN J. FRANK, AND JOHN W. LEON, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD L. CAREY
WALTER E. GILLCRIST
Counsel for Petitioners
821 Fifteenth Street, N. W.
Washington, D. C., 20005

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Amendment and Statutes Involved	3
Statement	4
Reasons for Granting the Writ	11
Conclusion	20
Appendix A. Opinions Below	1a
B. Conflicting Opinions	12a
C. Judgment	24a

CITATIONS

CASES:

Abel v. United States, 362 U.S. 217 (1960)	18
Beck v. Ohio, 379 U.S. 89 (1964)	17
Berry v. United States, 8th Cir., 295 F. 2d 192 (1961)	13
Brilliant v. United States, 8th Cir., 297 F. 2d 385 (1962)	13
Burdeau v. McDowell, 256 U.S. 465 (1921)	10
Dennis v. United States, 10th Cir., 346 F. 2d 10 (1965)	12
Gordon v. United States, D.C. Cir., 112 U.S. App. D.C. 33, 299 F.2d 117 (1962)	12
Jones v. United States, 362 U.S. 257 (1960)	17
Ker v. California, 374 U.S. 23 (1963)	19
Mallory v. United States, 354 U.S. 449 (1957)	19
Miller v. United States, 357 U.S. 301 (1958)	19
Nardone v. United States, 302 U.S. 379 (1937)	19
Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959)	11
Rochin v. California, 342 U.S. 165 (1952)	19
Simmons v. United States, D.C. Cir., 113 U.S. App. D.C. 369, 308 F. 2d 324 (1962)	12, 13
Stoner v. California, 376 U.S. 483 (1964)	17
United States v. Giampa, 2d Cir., 290 F. 2d 83 (1961)	12
United States v. Ventresca, 380 U.S. 102 (1965)	17
Weeks v. United States, 232 U.S. 383(1914)	19

Page

CONSTITUTIONAL AMENDMENT:

Fourth Amendment to the Constitution of the United States 3, 19

STATUTES:

The Act of June 19, 1934, c. 652, 48 Stat. 1064, known as the Federal Communications Act, 1934 as amended:

Sec. 301, 48 Stat. 1081, 47 U.S.C. 301, as amended 4
Sec. 318, 48 Stat. 1089, 47 U.S.C. 318, as amended 4
Sec. 409(1), 48 Stat. 1096, 47 U.S.C. 409(1), as amended 6
Sec. 501, 48 Stat. 1100, 47 U.S.C. 501, as amended 4
Sec. 502, 48 Stat. 1100, 47 U.S.C. 502 4

The Act of September 2, 1957, 71 Stat. 595, known as the Jencks Statute, 18 U.S.C. 3500 ..... 13, 14
22 D.C. Code (1961 ed.) 1800 4
Federal Rules of Criminal Procedure:
Rule 6(e) 3
Rule 41(e) 3, 18

REGULATION:

47 C.F.R. § 15.206 4

MISCELLANEOUS:

Dungan v. Frank, et al. (USDC D.C.) Civil Action No. 1122-62 ..... 9, 10, 18
In Re Douglas P. Weaver (USDC D.C.) Misc. Nos. 27-63, 14-64, 19-64 6
Shimon v. United States, D.C. Cir., No. 19064 ..... 6, 8

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Petitioners, John J. Frank, and John W. Leon, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 22, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia denying petitioners' motion to suppress evidence (R. 32), printed in Appendix A

hereto, infra, p. 10a, is reported in 225 F. Supp. 573. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, p. 1a, is reported in U.S. App. D.C. , 347 F. 2d 486.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1965, R. 207, Appendix C, p. 24a, infra. Rehearing was denied July 30, 1965, R. 225. On August 20, 1965, Mr. Justice Potter Stewart signed an order extending the time within which to petition for a writ of certiorari to and including September 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Is a criminal defendant, in a federal court, entitled to an in camera inspection by the trial judge of the grand jury testimony of an important Government witness, relating to the matters upon which he testified on direct examination at trial, as a matter of right.

2. If such a defendant is not entitled to an in camera inspection of the witness' grand jury testimony, by the trial judge, as a matter of right, would he be entitled to such an inspection, under the specific facts of the instant case, particularly where at a subsequent trial, involving the same testimony, another trial judge examined his grand jury testimony in camera and found many material inconsistent statements.

3. Whether the Court of Appeals may decide an unlawful search and seizure issue by making a factual determination that petitioners had abandoned the seized property, where they had never been given a hearing on the factual issue, through no fault of theirs.

4. Should evidence, in federal courts, otherwise admissible, be excluded, where procured by the Government in direct violation of a written order of a United States District Judge.

STATUTES AND CONSTITUTIONAL AMENDMENT

The Fourth Amendment to the Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 6(e) Federal Rules of Criminal Procedure

Rule 6 (e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. * * * *

Rule 41(e) Federal Rules of Criminal Procedure

Rule 41 (e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the

return of the property and to suppress for use as evidence anything so obtained on the ground that * * * The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioners were convicted in the United States District Court for the District of Columbia, following a jury trial, of violations of the Federal Communications Act, 48 Stat. 1064 (1934) as amended, to wit, wilfully using or operating an apparatus for the transmission of energy by radio within the District of Columbia without a license contrary to 47 U.S.C. § 301, 501 (1958) (count 2); the wilfull operation of such apparatus without a license, 47 U.S.C. § 318, 501 (count 3); and the wilfull violation of a regulation of the Federal Communications Commission, by operating a low power communication device without complying with the conditions of 47 C.F.R. § 15.206, in violation of 47 U.S.C. § 502 (count 4) (R. 1-3, 35).

Sentence was imposed with respect to each defendant, of one year imprisonment as to counts 2 and 3, the sentence to run concurrently, and a fine of five hundred dollars ($500.00) on count 4.[1] (R. 41).

[1] Count 1 of the indictment, charging housebreaking, 22 D.C. Code § 1801, was dismissed upon motion.

On March 31, 1962, petitioner, John Frank, reserved room 639 at the Mayflower Hotel, Washington, D. C. (R. 71, 72). The management anticipated that Frank would pay for the room (R. 72). In the early afternoon of that date, Douglas P. Weaver, an associate of Frank and the defendant, Angelone,[2] registered at the hotel, using an alias, left his baggage in room 639, and left the key to the room at Angelone's and Frank's office (R. 89, 90). Lena Hickerson, a maid at the hotel, testified that sometime after her lunch but before she left work at 4:00 o'clock P.M., that date, she saw two men, whom she identified as Leon and Frank, leave room 633 of the hotel (R. 79-82), but the petitioners whom she identified at trial did not match the physical description which she had previously given the Government (R. 83-85).

Room 633 was occupied by Malcolm Dungan, an Attorney, representing El Paso Natural Gas Company in proceedings before the Federal Power Commission (R. 100, 101).

The Government proved that an automatic radio device, hereinafter referred to as a "bug", was transferred from a private detective, named Barber, to Detective Jones of the Metropolitan Police Department, after having been repaired by Officer Bennett of the Police Department (R. 53-60). Jones transferred the "bug" to Inspector Shimon of the Police Depart-

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[2] Angelone, Frank and Leon were indicted and convicted as set forth above. While the case was pending on appeal, the Government granted Angelone immunity, and the Court of Appeals held that his convictions should be vacated and the indictment, as to him, dismissed. See Appendix A, p. 1a at p. 6a.

ment (R. 62, 63).[3] On Monday evening, April 2, 1962, Dungan found the "bug" or one very similar to it, in his room (R. 104).

Weaver testified,[4] that after spending about two hours on personal business, he returned to the hotel, on Saturday, March 31st, went to room 639 and saw Shimon holding the "bug" and blowing on it (R. 90). Frank and Angelone were present in the room (R. 90) but did not touch or talk about the "bug".

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[3] Barber was granted immunity by the Government. In a matter growing out of the Grand Jury investigation of this case, but with which petitioners had absolutely no involvement, Jones and Shimon were indicted for perjury, obstruction of justice, conspiracy to obstruct justice, and additionally Shimon was charged with the same F.C.C. violation of a regulation as were petitioners. Jones pleaded guilty to an information charging a violation of an F.C.C. regulation and he received a suspended sentence of a fine of $25.00. The remaining charges were dismissed (R. 64-67). Shimon was acquitted of the F.C.C. violation, but convicted of conspiracy to obstruct justice and obstruction of justice. His conviction was reversed by the Court of Appeals on September 9, 1965 on an evidentiary question. D.C. Cir., No. 19064.

[4] Weaver was subpoenaed to appear before the Grand Jury in August, 1963, where he refused to answer questions on the grounds of self-crimination. Thereafter the Government granted him immunity pursuant to 47 U.S.C. § 409(1). On three occasions, subsequently, he appeared before the Grand Jury and was again given immunity. See Miscellaneous Nos. 27-63, 14-64, and 19-64 in the United States District Court for the District of Columbia. At trial, Weaver again refused to answer on grounds of self-crimination (outside the presence of the jury) and again received an order of immunity (R. 85-87).

From August 20, 1963, the date of Mr. Weaver's first appearance before the Grand Jury until April 14, 1964, the date he testified at trial, Weaver was paid $2,681.92 from the United States in the form of witness fees, subsistence and travel money (R. 164 et seq.). During this same period, Mr. Weaver had no other employment (R. 98). The amount of money he received averaged more than five (5) days pay per week during this period.

Weaver also testified, "... and two days later (Monday, April 2, 1962), because we were having mechanical difficulty, Mr. Leon was asked to come over to straighten out things mechanically" (R. 93, 94).

It was at this point that a critical question arose concerning petitioners. Despite the contradiction between its own witnesses (Weaver having stated that Leon came into the affair on Monday, April 2nd, and Miss Hickerson having stated that Leon and Frank came out of Dungan's room on Saturday, March 31st) the Government argued that Weaver returned to the hotel prior to 4:00 o'clock P.M. on Saturday, March 31st, saw Shimon with the "bug", and afterwards Miss Hickerson saw Leon and Frank come out of Dungan's room, thus indicating that Frank and Leon had placed the "bug" in Dungan's room. The defense on the contrary argued that according to Weaver's timetable, he returned to room 639 at 4:00 o'clock P.M. or after, stayed fifteen minutes (R. 90, 91), and that therefore Miss Hickerson, who left work at 4:00 o'clock P.M. (R. 79) was either mistaken as to her identification or that Frank and Leon were not in Dungan's room for the purpose of putting in the "bug," in which case her testimony was immaterial and prejudicial.

The Government now knows, having granted immunity to both Weaver and Angelone, that Leon and Frank were not seen by Miss Hickerson coming out of Dungan's room as she testified. The Government has proof that it, itself, believes beyond any reasonable doubt.

With this conflict so obvious, the defense requested the Court to examine Weaver's Grand Jury testimony

in camera to determine if there were any material inconsistencies (Tr. 161-163). The motion was denied (Tr. 163).

Shimon was tried subsequent to petitioners. The Government present the same evidence, oral, documentary, and physical, with respect to Shimon's F.C.C. violation, as it presented in petitioners' trial. Weaver testified to the same matters. However, in Shimon's case, the defense asked for an in camera inspection by the Court of Weaver's Grand Jury testimony and it was granted. After reading the same the Court turned over to Shimon four (4) pages of typewritten, materially inconsistent statements.[5] These Grand Jury statements, at least in part, dealt with the critical time period on Saturday, March 31st, for Weaver testified before the Grand Jury on August 20, 1963 that he did not return to the hotel on Saturday, March 31st until 6:00 or 6:30 o'clock P.M. (No. 19064, Tr. 537).

Additionally, the Government proved that the "bug" in Dungan's room was being monitored in room 639 and that each of the defendants was seen entering or leaving that room during this period. It was also stipulated that none of the defendants had either a station or operator's license.

Late Wednesday afternoon, Dungan's attorneys obtained an injunction which was served on Angelone at

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[5] After oral argument in this cause in the Court of Appeals we found the transcript of Shimon's trial contained some of the material inconsistent statements of Weaver before the Grand Jury. They are contained in Court of Appeals No. 19064, Tr. 518 et seq. Some of them are set forth in petitioners' Petition for Rehearing, pgs. 7-11, R. 208, 218, 219). We have filed a motion with the Court of Appeals asking that this portion of the transcript in Shimon's case be certified to this Court as a supplementary record in this cause for use on this petition for writ of certiorari.

Room 639 that evening.[6] Shortly thereafter, Angelone left the room with a woman (R. 128). Immediately thereafter, the Assistant Manager and counsel for Dungan went into the room, saw the equipment, and placed a security lock on the door (R. 144). The next day, Leon was served with process in the civil action which required him to appear forthwith for the taking of his deposition. A motion was immediately filed on his behalf to quash or delay the taking of the deposition on the grounds that counsel had only minutes before been retained. The Court granted a delay on these grounds and, while leaving the Courtroom, the Judge asked counsel for Leon if he had any concern with the property which was found in the room. Counsel made an off-the-cuff remark which could not, under the circumstances, be deemed a waiver of a constitutional right.[7] The Court signed an order, ex parte, impounding the property located in room 639.

Shortly before the order was executed, two Engineers and an Attorney from the F.C.C. together with an Assistant Manager of the hotel, entered Room 639 and tested the equipment found therein, in conjunction with the "bug" found in Dungan's room (R. 155-158). This search was made without a warrant (R. 157). Mr. Kleist testified at trial concerning his findings as a result of this search (R. 157).

The impounding order of the Court directed that the exhibits be placed in the Marshal's safe, pending further order of Court. Despite this order, agents of the

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[6] Civil Action No. 1122-62 (U.S.D.C. D.C.). Since the Court of Appeals must have taken judicial notice of the record in this civil action, we have also moved the District Court to certify the same to this Court as a supplementary record in this cause.

[7] See footnote 2, p. 3 of the petition for rehearing, R. 213.

F.C.C., without any authority from the Court, and with the consent of the Marshal, took these exhibits out of the safe and brought them to the F.C.C. for further testing. These facts were stipulated to by the Government (R. 144, 154). In addition, on two occasions, these exhibits were taken before the Grand Jury, after the Government made written application to the Court, EX PARTE, and the same were granted (See Civil Action No. 1122-62).[8]

Following the indictment, a motion to suppress was filed by petitioners, on the basis that a private trespass of Room 639 resulted in the Government obtaining the property belonging to them (R. 3-5). The Government denied the legal efficacy of the motion (R. 5). The Court held a hearing on the law, then took the matter under advisement, pending the filing of briefs by the parties (R. 6) The Government, at the oral hearing, did not advise the Court of the true facts in the case. In their brief, filed after the defendants' brief, in an asterisk footnote, one sentence mentioned the fact that agents of the F.C.C. had entered the room (R. 8, 45-50). Neither counsel for defendants nor the Court was aware of this fact and the motion was denied on the basis of *Burdeau* v. *McDowell,* 256 U.S. 465 (1921).

At trial when the Government sought to introduce the exhibits in evidence,[9] the motion to suppress was

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[8] Counsel for the defendants in the criminal action was then counsel for the same defendants in the civil action and there is no question that the record in the civil case clearly shows this fact. Government counsel was also well aware of this fact. No notice of any kind was ever given by Government counsel.

[9] Government Exhibits Nos. 9 through 15, consisting of a tape recorder, radio, tapes, wires and a photograph showing the wires connected to the other instruments.

renewed and denied (R. 131, 132). However, when Mr. Kleist's testimony revealed that he had entered Room 639 and had tested the equipment in conjunction with the "bug" in room 633, the motion to suppress was renewed on these new grounds (R. 156, 159, 160). It was again denied by the Court (R. 160).

No factual hearing was ever held.[10] On appeal, the convictions of petitioners were affirmed (R. 207).

REASONS FOR GRANTING THE WRIT

I

In Camera Inspection of Grand Jury Testimony

1. In *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, at 401, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959), this Court, while holding that a defendant does not have an absolute right to the production of grand jury testimony of a Government witnesses who has just testified on direct examination, left open for future decision, the question of a defendant's right to an in camera inspection of such witness' testimony by the Court.

2. The right of a defendant to an in camera inspection of the grand jury testimony of a Government witness, and under what circumstances, is an issue which has plagued the Circuit Courts of Appeal and resulted in a wide variety of rules.

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[10] When taking the pre-trial motion to suppress under advisement, the Court stated that it would hold a further hearing, if the need was indicated (Tr. 38). Since the Government did not advise the Court at the oral hearing of the true facts (See R. 45-50 for the Government's entire presentation on this issue) and the Court having determined as a matter of law that even were the facts true, a motion to suppress would not lie where the property was obtained by a private trespass, there was no need to hold a factual hearing until Mr. Kleist testified at trial.

The Second Circuit Court of Appeals holds, that upon request, the Court must examine the grand jury testimony relating to the subject matter of the direct examination testimony of a Government witness, in camera, and if the same contains material inconsistent statements, they must be turned over to the defense. *United States* v. *Giampa,* 2d Cir., 290, F. 2d 83 (1961).[11] For opinion see Appendix 17a.

The Tenth Circuit Court of Appeals recognizing that a conflict exists on this issue, particularly between the Second Circuit and the District of Columbia Circuit Courts of Appeal, believes that the safe policy is to grant such motions for in camera inspections by the trial court. *Dennis* v. *United States,* 10th Cir., 346 F. 2d 10, at 17, 18 (1965). In fact, the Court points out, that Federal Courts have been roundly criticized for their paltry interpretations of rules of discovery.[12]

The District of Columbia Circuit has formulated two rules on this issue. *Gordon* v. *United States,* 112 U.S. App. D.C. 33, at 35, 299 F. 2d 117 (1962) holds, that where the prosecution presents only one (1) witness in support of the indictment, and that witness' testimony is uncorroborated, and it is contradicted by the defense, then, upon request, the trial court must examine the grand jury testimony of the Government witness. For opinion see Appendix 12a.

In *Gordon,* supra, Chief Judge Bazelon (then Judge) refused to commit himself on whether the rule should be limited to one or more witnesses. However, in *Simmons* v. *United States,* 113 U.S. App. D.C. 369

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[11] All Circuits seem to agree that once an in camera inspection is held, and material inconsistent statements are found therein, justice requires such statements be furnished to the defendant.

[12] *Dennis* v. *United States,* supra, footnote 6 at p. 17.

at 370, 308 F. 2d 324 he formulated a rule that whenever it appears that the testimony of an "important" Government witness at trial may be inconsistent with his prior testimony before a grand jury, then a defense request for an in camera inspection should be granted, but that this rule does not imply that a showing of probable inconsistency should be required in all cases.

Neither rule is satisfactory. The *Gordon* rule will be applicable to extremely few cases. Very few federal criminal trials present a single uncorroborated witness in support of an indictment. The *Simmons* rule requires a showing of some probable inconsistency. This is difficult in a case such as the instant one, where the witness gave no statements to the Government producible under 18 U.S.C. § 3500. And because of the Jencks Statute, Government Prosecutors today are more inclined to put their witnesses before the grand jury immediately, rather than take statements, production of which will be required at a later date. In view of the fact that the rule on the one hand requires a showing of probable inconsistency, and in the next breath states that such a showing is not required in all cases, no standard is set which will provide some uniformity in criminal trials within the Circuit.

The Eighth Circuit Court of Appeals appears to adhere to a rule, that if the witness has previously made a statement to the Government, producible under 18 U.S.C. § 3500, and his statement agrees with his testimony on direct examination, then a motion for an in camera inspection of the witness' grand jury testimony will be denied. Cf. *Brilliant* v. *United States,* 8th Cir., 297 F. 2d 385 (1962) and *Berry* v. *United States,* 8th Cir., 295 F. 2d 192 (1961).

3. We believe that this Court's supervisory role in the administration of criminal justice in Federal Courts requires that this conflict between the Circuit Courts of Appeal be resolved. We believe that the views of the Second Circuit Court of Appeals on this point are practicable, workable, completely protect the traditional secrecy of the grand jury proceedings, and render justice to all by making material inconsistent statements contained in the grand jury testimony of a witness, on the same subject matter, available to the defendant, following the Court's impartial in camera inspection of the same.

4. In the instant case, the Court of Appeals apparently applied the *Gordon* rule, for they speak of Weaver as not being critical; that his testimony was corroborated; and no showing of probable inconsistency was made. However, in Weaver, we have a witness whom the Court of Appeals deemed an accomplice, thus one whose testimony should be scrutinized with caution; a witness who pleaded self-incrimination on at least four occasions concerning the subject matter of his testimony on direct examination; a witness who had been granted immunity by the Government on four different occasions with respect to the subject matter that he testified on direct examination; a witness, who had made no previous statement to the Government which could be produced under 18 U.S.C. § 3500 and be compared with his testimony on direct examination; a witness, who from the date of his first appearance before the Grand Jury on August 20, 1963 until his appearance at this trial on April 14, 1964 received from the Government $2,681.92 in witness fees, subsistence and travel expenses, amounting to a rate of five days pay per week during this period; a witness,

who was otherwise unemployed during this period; a witness, who contradicted Lena Hickerson with respect to when Leon came into the affair, thus casting doubt on the alleged eye-witness identification by Miss Hickerson, see supra, pp. 5, 7: and most important of all a witness, whom we know, from a later trial, did in fact testify before a grand jury, materially inconsistent with his statements on direct examination in this trial, particularly involving the critical time element which would have destroyed the testimony of Miss Hickerson, see supra, p. 8,[13] and finally a witness, who while testifying concerning the same subject matter in a later trial was found, by the Court's in camera inspection of grand jury testimony, to have made material inconsistent statements.

We believe that this case presents an excellent opportunity to examine the issue and resolve the conflicts which now exist not only among the Circuit Courts of Appeal, but within the Circuits themselves.

II

The Unlawful Search and Seizures and the Failure to Grant a Hearing

It is undisputed that agents of the Federal Communications Commission (hereinafter referred to as F.C.C.), including an attorney, entered Room 639 of the hotel, and tested the equipment contained therein by itself and in conjunction with the "bug" located in room 633 (R. 155-158). It is also undisputed that a great deal of information was initially obtained from this search which was used subsequently for fur-

[13] Quisdorf, Leon's office manager, testified that he talked with Leon several times on Saturday, March 31st, each time reaching him at home (R. 168-174).

ther testing and which resulted in the trial testimony of the expert witness, Mr. Kleist.

It is also undisputed that the search was conducted without a warrant having first been issued by a United States Commissioner or a judge (R. 157). It is also undisputed that ample time to procure a search warrant was available since the hotel had placed a security lock on the door of Room 639, in the presence of a Deputy Marshal, the evening before (R. 144, Tr. 430, 431), thus effectively preventing anyone from entering the room and removing the evidence contained therein.

It is also undisputed that the defendants were unaware of this search, conducted by agents of the F.C.C., until Mr. Kleist revealed the facts during his testimony at trial (R. 156). Prior thereto they were only aware of the private trespass which had occurred, which was the basis for their initial motion to suppress, denied by the Court as a matter of law (R. 3-5, 32).

The Court of Appeals held that petitioners had no complaint concerning these searches because the property had been abandoned (Appendix A, p. 5a infra). This was a factual determination made by the Court of Appeals, where no factual hearing was ever held, through no fault of petitioners. They relied on ex parte affidavits contained in the civil action litigation. These revealed only that the hotel considered the property abandoned. On the other hand, the evidence showed that the room key had not yet been returned; that the property was located in the room in plain view on top of a table and dresser; that the objects were obviously of some value and not the type to be left in a hotel room that was vacated; that the hotel, itself, had placed a security lock on the door of room

639, instead of taking possession of the property and returning the room to service, which would have occurred if the property was really thought to be abandoned.

The Court of Appeals on two occasions refers to the fact that Angelone left the room accompanied by a woman, around dinnertime, carrying a suitcase. They assume it was his suitcase. Factually that was not true, but petitioners never had an opportunity to prove it. The mere fact that a person leaves a room is no inference that he is vacating the hotel room.

2. Why didn't petitioners have a factual hearing? The hearing on the first motion to suppress was a legal argument, and the issue was decided as a matter of law. At this time, petitioners did not know of the search by the F.C.C. agents. When they discovered it at trial, a motion to suppress was made, and promptly denied without a hearing. To suggest that petitioners should then have introduced evidence pertaining to the issues of a motion to suppress, during the course of a trial on the very different issues of guilt, would seem erroneous.

This Court has warned, in several cases, of the necessity of obtaining search warrants. *United States* v. *Ventresca,* 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), *Beck* v. *Ohio,* 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). It has also warned that rules relating to the law of private property, such as abandonment, are not to be utilized in search and seizure questions. *Jones* v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), *Stoner* v. *California,* 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Although this point was strenuously argued to the Court of Appeals, the opinion of the Court fails to mention the effect of *Jones,* and *Stoner,* supra, on their finding of the fact of abandonment.

3. A factual hearing should have been held during the trial when the search by the F.C.C. agents was discovered by petitioners. We believe that the right to a hearing on factual issues, as provided in Rule 41(e) of the Federal Rules of Criminal Procedure should be emphasized, and that the issue of how far a federal court should go in applying the law of private property in an abandonment situation involving a search and seizure question should be clarified.

5. In *Abel* v. *United States,* 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960) a factual hearing was held by the District Court, but the issue of abandonment was vastly different from the one presented in this cause.

III

Should Evidence Be Excluded Which Was Obtained by the Government in Direct Violation of an Order of a Federal Court

On April 5, 1962 in Civil Action No. 1122-62, captioned, *Dungan* v. *Frank, et al.,* Judge Hart entered an order impounding the personal property found in Room 639 of the Mayflower Hotel and directing the Marshal to impound the same and place the property in his safe, until further order of the Court. The Government stipulated that on April 12, 1962 this personal property was taken out of the safe of the Marshal and transmitted to the F.C.C. where it was examined and tested (R. 144, 154). This was done without any order or permission or authorization of the Court (See Civil Action No. 1122-62). The results of the testing, and the exhibits themselves were introduced in evidence, over objection, at the trial (R. 160).

Of course intermingled with this question is the companion issue of whether the personal property had been abandoned by petitioners. Irrespective of abandonment, the Court of Appeals, while conceding the possibility of error, held that the error was not of such constitutional or other proportions as to bring into play the exclusionary rule.

This Court has denied admissibility with respect to evidence obtained in violation of the Fourth Amendment, *Weeks* v. *United States,* 232 U.S. 383; evidence obtained in violation of public policy as contained in a statute, *Nardone* v. *United States,* 302 U.S. 379; evidence obtained from a defendant in a shocking manner, *Rochin* v. *California,* 342 U.S. 165; evidence obtained in violation of a federal rule of criminal procedure, *Mallory* v. *United States,* 354 U.S. 449; and evidence obtained in violation of the procedure for making arrests, as set forth in a judicial opinion, *Miller* v. *United States,* 357 U.S. 301.

This Court has never placed a limitation on what evidence could be excluded if obtained by the Government as the result of an illegal act. In *Ker* v. *California,* 374 U.S. 23 at 31, the Court emphasized that principles governing the admissibility of evidence in criminal trials have not been restricted to those derived solely from the Constitution.

2. We believe that the Government should not have any favored position in the law, and because of its duty to see that justice is done fairly and honestly, evidence obtained as the result of an illegal act on the part of the Government should be excluded from evidence. No benefits should inure to the Government from its own illegality.

3. In the instant case, evidence obtained as a result of the removal of exhibits from the safe of the Marshal and their transmittal to the F.C.C. for examination and testing, was in direct violation of an order of a United States District Judge and should have been excluded.

4. This rule of exclusion should be made applicable to Governmental violations of Court orders and decrees. Disrespect for the law, should not be countenanced.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. CAREY
WALTER E. GILLCRIST
Counsel for Petitioners
821 Fifteenth Street, N. W.
Washington, D. C., 20005

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18842

JOHN J. FRANK, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 18843

OLIVER W. ANGELONE, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 18844

JOHN W. LEON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court for the District of Columbia

Decided April 22, 1965

Mr. Walker E. Gillcrist, with whom *Mr. Edward L. Carey* was on the brief, for appellants.

Mr. Gerald E. Gilbert, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Frank Q. Nebeker* and *Harold J. Sullivan,* Assistant United States Attorneys, were on the brief for appellee. *Mr. Robert D. Devlin,* Assistant United States Attorney, at the time the record was filed, also entered an appearance for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and FAHY and WRIGHT, *Circuit Judges.*

FAHY, *Circuit Judge:* Appellants were charged in a four count indictment, No. 1 charging housebreaking, 22 D.C. Code § 1801, which was dismissed by the court, and Nos. 2, 3 and 4 charging crimes arising from violations of the Federal Communications Act, 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 301, 318, 501 and 502 (1958), of which all appellants were found guilty by jury verdicts. Each was sentenced to imprisonment for one year on counts 2 and 3, to run concurrently, and fined $500 on count 4. The violations charged in counts 2, 3 and 4 were (1) the wilful and knowing use and operation of an electronic eavesdropping device, wireless microphone or "bug" for the transmission of energy, communications and signals by radio from one place in the District of Columbia to another without a station license, in violation of 47 U.S.C. § 301; (2) the setting up of a radio station and operating it without an operator's license issued by the Communications Commission, in violation of 47 U.S.C. § 318;[1] (3) the wilful and knowing violation of a rule, regulation or condition of the Commission by operating a low power communication device on a frequency above 70 megacycles without complying with the conditions of 47 C.F.R. § 15.206,[2] in violation of 47 U.S.C. § 502.

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[1] Both of these violations are made crimes by 47 U.S.C. § 501.

[2] 47 C.F.R. § 15.206 (Revised as of January 1, 1958) provides:

> A low power communication device may be operated on any frequency above 70 Mc. provided it complies with all of the following conditions:
>
> (a) Operation is limited to one second duration and to occur not more than once in 30 seconds.
>
> (b) The radiated field on any frequency from 70 Mc. to 1000 Mc. does not exceed the limits specified in § 15.62.
>
> . . . .
>
> (d) The device is provided with means for automatically limiting operation within the time restrictions specified in this section.

The "bug" was discovered under a table in Room 633 of the Mayflower Hotel, where a pending Federal Power Commission proceeding was being discussed by the lawful occupants of the room. A radio receiving set and a tape recorder were discovered two doors away in Room 639, used by appellants. They conceded they had neither an operator's nor a station license. The "bug" had a battery when found and was able to transmit signals by radio. When tested it was found to operate at a frequency above 70 megacycles, exceeded specified field strength limits, and was not equipped automatically to limit its transmission to a duration of one second not more than once in 30 seconds, all in violation of 47 C.F.R. § 15.206, note 2 *supra*.

Assuming for a moment that no material evidence used at the trial should have been excluded as inadmissible, a matter later to be discussed, the evidence supports the guilty verdicts. The "bug" or one like it was traced by several witnesses to appellants Frank and Angelone in the Mayflower Hotel. A maid testified she saw Frank entering Room 633, the door having been opened for him by someone inside, and that she saw both Frank and appellant Leon, neither of whom claimed any right of occupancy or use of that room, come out of Room 633. The direct testimony of an accomplice placed all three appellants in Room 639, which had been reserved by appellant Frank in the name of D. P. Baxter, during the period from March 31, 1962 to April 4, 1962 when the "bugging" allegedly occurred. The accomplice testified that the receiving set and recorder later found in Room 639 were operative during this period and that conversations from Room 633 were being received in Room 639 when all appellants were there. The occupants of Room 633 were alerted that their conversations were heard as being received in Room 639. Private detectives were then employed and the "bug" was discovered in Room 633. Surveillance of Room 639 followed, with ample verification of receipt there of conversations taking place in Room 633.

Appellants were observed entering and leaving Room 639 during the five day period of its occupancy by them. The final departure was on April 4, 1962 when one appellant was seen leaving with a suitcase and an unidentified woman. None returned so far as the evidence indicates.

We are satisfied there was such ample evidence of the clandestine use of the "bug" in Room 633 and the receiving apparatus in Room 639 as to constitute a factual issue which the jury was warranted in resolving as proof of appellants' guilt.

They contend, however, that material evidence at the trial, consisting of the receiving and recording apparatus found in Room 639, was obtained by an unlawful search and seizure and, therefore, should have been excluded on their motion filed under Rule 41(e), Fed. R. Crim. P.

The possession of the United States of this equipment came about as now stated. When the "bugging" was discovered the lawful occupants of Room 633 filed a civil action in the District Court. On the same day, April 4, 1962, a Deputy United States Marshal served process on appellant Angelone in Room 639. Shortly thereafter Angelone left this room with a suitcase and there was no evidence that he or any appellant returned or retained any interest in the room. On the evening of April 4 the hotel management placed a security lock on the room after having observed that there was no clothing or other sign of continuing occupancy, though the radio receiver and tape recorder remained. This entry was made by the assistant manager and the attorney for the plaintiffs in the civil action. The next morning process in that action was served on appellant Leon. The same day, April 5, a hearing was held on his motion to quash the process, at which time his counsel disclaimed any interest in the equipment left in the hotel room. Plaintiffs also obtained an order signed by District Judge Hart impounding the equipment. The hotel management had indicated it considered the

room abandoned and wished the equipment removed. The afternoon of the same day a Deputy Marshal entered the room, removed the equipment pursuant to the impounding order and placed it in the Marshal's safe in the United States Courthouse.[3]

The entries of April 4 and 5, made with the permission of the hotel management, were not in violation of any right of privacy of appellants. Room 639 was properly considered then as having been abandoned by appellants.[4] Accordingly, seizure of the articles pursuant to the impounding order, even if such seizure could be considered as accumulating evidence of a crime, was not unconstitutional. See *Abel* v. *United States*, 362 U.S. 217, 240-41.

Both the radio receiver and tape recorder were turned over to the grand jury by the Marshal pursuant to subpoenas. Judge Hart had made his impounding order in the civil action subject to the subppoenas. Appellants contend that this permission of the court was granted without notice to defendants in the civil action. They apparently attack on this ground the admission of the articles in evidence at the criminal trial, and they also complain that the impounded receiving set was delivered by the Marshal without court order to the Federal Communications Commission for examination prior to Judge Hart's order releasing it to the grand jury.[5] We find no

[3] Just prior to the arrival of the Deputy Marshal, officials of the Federal Communications Commission, with the permission of the hotel management, had entered Room 639 to examine the equipment which had been left there.

[4] Compare *United States* v. *Jeffers*, 342 U.S. 48, where the accused retained an interest in the room entered by the hotel management without permission.

[5] The radio receiver thus delivered to F.C.C. officials was not for the purpose of testing but for "an external examination." The F.C.C. officials had previously done some testing with the radio receiver at the hotel after Room 639 had been vacated. But the later testing of the "bug" from Room 633 was apparently performed only with the F.C.C.'s own receiving set.

basis upon which to rest reversal of the criminal convictions because of the above uses of the equipment and the admission of evidence stemming from such use. If there was error in issuance of the order *ex parte* or in the Marshal making the equipment available to the Commission the error was not of constitutional or such other proportions as to bring into operation the "poisonous tree" doctrine requiring exclusion of the fruit of the error. There was no unlawful search or seizure and no invasion of any personal or property right of appellants calling for exclusion of the evidence.

Appellants also contend that the court abused its discretion in refusing to peruse *in camera,* as requested by the defense, the grand jury testimony of a witness for the prosecution. The testimony of this witness was adequately corroborated at trial, and no inconsistencies appeared. While the absence of inconsistencies is not conclusive, since in a proper case the opportunity to test the trial testimony for inconsistencies should be permitted by use of grand jury testimony, this witness' trial testimony was not so critical or fundamental to the prosecution as to give rise to a particularized need that the court examine the minutes. We find no abuse of discretion in the court's refusal of the request that it do so. Compare *Gordan* v. *United States,* 112 U.S. App. D.C. 33, 299 F.2d 117 (1962).

A separate and important question is raised on the appeal of Angelone. After his conviction and pending this appeal therefrom he represents that he was subpoenaed to appear before a grand jury in this jurisdiction, that his motion to quash the subpoena was denied, that he refused to answer questions before the grand jury concerning matters involved at his trial, claiming his privilege against self-incrimination, that the United States invoked the immunity statute and thereupon the court ordered him to answer under the provision of the statute, which he

did. In its brief before us the United States does not dispute the above, stating,

> After appellant Angelone was tried, convicted and sentenced, he was called upon to testify before a grand jury. The grand jury was investigating other crimes and the crime in the instant case so far as the facts concerned other suspects. Appellant Angelone refused to testify on grounds of self-incrimination. He was compelled to testify under the immunity statute, 47 U.S.C. 409(L).

Angelone contends that his conviction has been mooted and must be set aside. Assuming the facts to be as above indicated, we agree. But we shall allow the Government, if so advised, opportunity to supplement or clarify the factual situation as it may be thought to bear on the question of mootness.

The immunity statute, 48 Stat. 1097 (1934), 47 U.S.C. § 409(*l*) (1958), provides in pertinent part:

> no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Under this language Angelone may not be "subjected to any penalty . . . for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . . ." Therefore he may not be penalized in the present case since, as we are now advised, his compelled testimony concerned matters related to his conviction which is here on appeal. The United States points out, however, that the conviction had already occurred, and that the immunity statute does not apply to any penalty

that may result from his appealed conviction because such penalty cannot be attributable to his testimony as given before the grand jury. We think this is too narrow a construction of the immunity statute and is inconsistent with the "Policies of the Privilege" as most recently described by the Supreme Court. *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52.

While we are not bound to construe literally the language of immunity if to do so would run counter to the intent or purpose of Congress, we have no reason to decide that that intent or purpose was other than to permit an exchange of a particular conviction, such as Angelone's, for the larger benefit believed to reside in compelling his self-accusatory testimony. Congress has not sought to enable the government to obtain both such compelled testimony and a conviction related thereto which is either not yet obtained or if obtained is pending on appeal. Congress left the choice to the executive officials administering the criminal law, subject to District Court approval. Compelling one to give testimony which, except for the grant of immunity, is self-incriminating sacrifices the power to penalize the person granted the immunity if he has been convicted with respect to the matters about which the testimony is compelled and his appeal from the conviction is pending when such testimony is given. It probably will not be questioned that should such a conviction be reversed the intervening immunity would preclude a subsequent re-trial. But if the conviction is affirmed, the appellant is "subjected to . . . penalty" not only by the previous conviction but by the subsequent affirmance.

Our opinion has pointed to no trial error warranting reversal on the merits; and our review of the record for possible trial error has not sought to separate the evidence against Angelone, commingled as it was with that involving the other appellants as to whom it was necessary to decide the merits of the appeal. This treatment

of the case does not preclude applying the immunity to Angelone; for the immunity does not depend upon the outcome of his appeal considered apart from the immunity.

To repeat, the Government may not convict a person and then, pending his appeal, compel him to give self-accusatory testimony relating to the matters involved in the conviction. Any other construction of the statute would lead to such potential abuse as to preclude such construction if it may reasonably be avoided consistently with the congressional purpose. Our construction and application of the statute we think coincides with that purpose. *Piemonte* v. *United States,* 367 U.S. 556, is not to the contrary. No appeal from the conviction was there pending. Moreover, the case involved contempt of court for refusing to obey the court's order. No question as to the possible mooting of the previous conviction was presented or decided.

> *Affirmed as to Frank and Leon. As to Angelone, unless the United States requests an opportunity to present additional evidence to this court on the issue of mootness, the judgment of conviction is set aside with directions to dismiss the indictment.*

Senior Circuit Judge, WILBUR K. MILLER concurs in affirmance of the convictions of appellants Frank and Leon but dissents from the disposition made by the court of the conviction of Angelone, which he would also affirm.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JOHN J. FRANK, JOHN W. LEON, OLIVER W. ANGELONE, *Defendants.*

Crim. No. 134-63.

United States District Court
District of Columbia.

Jan. 15, 1964.

* * * * * * * * * * *

David C. Acheson, U. S. Atty., Harold J. Sullivan, Asst. U. S. Atty., Washington, D. C., for plaintiff.

Edward L. Carey, Walter E. Gillcrist, Washington, D. C., for defendants.

YOUNGDAHL, District Judge.

Various motions of defendants came on to be heard before this Court on November 1, 1963. Thereafter defendants and the Government filed briefs, which this Court has considered, together with the original papers and the oral argument, in reaching the following conclusions:

[1-3] 1. The motion (filed April 2, 1963) to suppress upon the ground that certain property was seized in violation of the Constitution must be denied. The articles were seized in connection with a civil case by persons who had no connection with any law enforcement officer of the Government. The subsequent use of such property by a grand jury which later began an investigation into certain matters first revealed in the civil proceedings and the similar use by the Government in the forthcoming trial of this case do not violate any prohibition of the Constitution. See Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). The exclusionary rule applied to evidence

seized in violation of the Fourth Amendment is designed to force law enforcement agents to observe the procedural safeguards of the Constitution. Where, as here, any possible irregularity—actually, it is not clear that there was any such irregularity—was solely the responsibility of private persons, with no connection or collusion of any kind with any law enforcement agent, the exclusionary rule does not apply.

* * * * * * * * * *

APPENDIX B

299 F.2d 117

ROBERT W. GORDAN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 16537.

United States Court of Appeals
District of Columbia Circuit.

Argued Oct. 27, 1961.

Jan. 25, 1962.

Decided Jan. 25, 1962.

The defendant was convicted in the United States District Court for the District of Columbia, George L. Hart, Jr., J., under a seven count indictment charging violations of the federal narcotics laws, and he appealed. The Court of Appeals, Burger, Circuit Judge, held that where the government's case was based on the testimony of one police officer, and his testimony was categorically and materially controverted by the sole defense witness, the trial judge, on the defendant's request, should have examined the grand jury testimony of the officer for possible inconsistencies, and, if any significant inconsistency should appear to the trial judge, he should have made the pertinent portions of the grand jury record available to the defense.

Judgment reversed and case remanded with instructions.

Bazelon, Circuit Judge, dissented in part.

CRIMINAL LAW

Trial judge, on defendant's request, should have examined grand jury testimony of police officer, on whose

testimony government's case was based, and, if any significant inconsistency should appear to trial judge, he should have made pertinent portions of grand jury record available to defense, where testimony of officer was contradicted by defense.

—o—

Mr. George W. Shadoan, Washington, D. C. (appointed by the District Court) for appellant.

Mr. Arnold T. Aikens, Asst. U. S. Atty., with whom Messrs. David C. Acheson, U. S. Atty., Nathan J. Paulson and Victor W. Caputy, Asst. U. S. Attys., were on the brief, for appellee.

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BURGER, Circuit Judge.

Appellant was convicted on all counts of a seven count indictment charging violations of the federal narcotics laws. The government's case was based on the testimony of a single witness, police officer Joy, who had been acting in the role of an undercover agent at the time the prohibited narcotics transactions allegedly took place in July, 1960. The defense offered only one witness in rebuttal,[1] one Oliver Hughes, who was at the time of the trial serving a sentence at the Lorton Reformatory. Officer Joy testified that Hughes and one Rogers, a government informant and "special employee," had been present at one of the narcotics transactions charged. Hughes was called by the defense and in effect denied that he had ever seen Officer Joy prior to trial and further denied that on the day in question he had either pointed out the defendant as a narcotics peddler or witnessed any drug transactions in which the defendant was involved.

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[1] The defense also called the Assistant United States Attorney as a witness, but for a collateral purpose.

The appellant here urges, *inter alia*, that the trial court committed error in refusing to inspect *in camera* the grand jury testimony of Officer Joy to determine whether any inconsistencies existed between what the officer told the grand jury and his testimony at trial.

We have carefully examined appellant's other contentions and find them without merit.

This court has had recent occasion, in DeBinder v. United States, 110 U.S.App.D.C. 244, 292 F.2d 737 (1961) and Jackson v. United States, No. 16342, Nov. 2, 1961, 111 U.S. App.D.C. 353, 297 F.2d 195, to examine the propriety of trial examination of testimony given in the traditional secrecy of the grand jury proceeding. In the DeBinder case the court held that grand jury testimony be produced for defense inspection when the record disclosed that the sole eye-witness to the crime may have been confused as to the identity of the defendant, who was the twin of a man charged with a different crime in the same neighborhood on the same evening. The possibility of confusion was deemed sufficient to show the defendant's "particularized need" for direct production of grand jury minutes under Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959).

In Jackson, a denial of a request for *in camera* inspection by the trial court was affirmed on the ground that there was not a showing of need on the defendant's part. There however, two police officers witnessed the crime and defense counsel stipulated that the testimony of the second detective who was not called as a witness would have been cumulative with that of the detective who was called. This stipulation effectively erased any reasonable basis for doubt as to the credibility of the first officer, and thus eliminated any need to further assure the veracity of his testimony by checking it against his statements to the grand jury.

As we view the matter, the instant case is not controlled by either the DeBinder case or the Jackson case just discussed. Here the government's case hangs by a single thread, the testimony of one police officer, which was categorically and materially controverted by the sole defense witness. Hence credibility was the ultimate issue for the jury. It does not seem to us that the traditional policy of keeping grand jury minutes secret to protect witnesses is served when the particular witness is a police officer whose identity has become known, nor do we think that an impediment to the speedy and orderly administration of justice will be created by requiring the trial judge to examine grand jury minutes of a single uncorroborated prosecution witness, *in camera*, when requested to do so, and to permit the defense to examine the minutes thereafter should the court find significant inconsistencies between the grand jury testimony and the testimony given at trial. Whatever invasion of the historic sanctity of grand jury proceedings such examination may cause, if any, seems to us outweighed by the additional certainty this procedure will lend to the process of verifying as credible the uncorroborated testimony of a sole witness for the government.

To be distinguished from our ruling are those decisions elsewhere which indicate the availability of *in camera* inspection by the trial judge regardless of the number of prosecution witnesses at trial who may also have testified before the grand jury. See, e. g., United States v. Giampa, 290 F.2d 83 (2d Cir. 1961). We do not agree with the broad sweep of those holdings and we decline to adopt a rule which goes so far. We hold simply that when at trial the prosecution presents only one witness in support of the indictment, whose testimony is not otherwise corroborated, and where the testimony of this witness is contradicted by the defense, the trial judge shall, upon request, examine the grand jury testimony of that single witness for possible inconsistencies, and where any significant inconsistency ap-

pears to the trial judge he shall make the pertinent portions of the grand jury record available to the defense.

Our holding does not require us to reverse and vacate the judgment in the present case. We remand the case to the District Court with instructions to the District Judge to examine Officer Joy's grand jury testimony *in camera*. If any significant inconsistency between that testimony and his testimony at trial is found by the District Court, the pertinent grand jury minutes shall be made available to the defense. If a motion for a new trial is then made it is to be granted.

Remanded for further proceedings.

BAZELON, Circuit Judge (concurring in part and dissenting in part).

I agree that this Court's decision in DeBinder v. United States, 110 U.S.App.D.C. 244, 292 F.2d 737 (1961), applies in the circumstances of this case. I do not purport to decide whether it also applies where more than one prosecution witness has testified before the grand jury. That case, of course, is not before us.

Under my view of DeBinder, if the District Court's *in camera* inspection of Officer Joy's grand jury testimony reveals inconsistencies with his testimony at trial, the District Court is required to make the grand jury minutes available to defendant's counsel "to urge upon the court, as grounds for a new trial, any material inconsistencies." Id. 110 U.S.App.D.C. at 246, 292 F.2d at 739. A new trial is required only if the inconsistency is material. The parties are entitled to be heard upon that issue.

• • • • • • • • • • •

UNITED STATES OF AMERICA, *Appellee*,

v.

DAVID GIAMPA, *Appellant*.

No. 178, Docket 26295.

United States Court of Appeals
Second Circuit.

Argued Nov. 14, 1960.

Decided Feb. 3, 1961.

Defendant was convicted in the United States District Court for the Southern District of New York, Sidney Sugarman, J., of knowingly harboring and concealing one for whose arrest a warrant had been issued, and he appealed. The Court of Appeals, Leonard P. Moore, Circuit Judge, held that evidence sufficiently established that defendant knew that a warrant or process had been issued for arrest of the federal fugitive he was charged with harboring and concealing.

Affirmed.

1. CRIMINAL LAW

Evidence sufficiently established that defendant knew that a warrant or process had been issued for arrest of federal fugitive he was charged with harboring and concealing. 18 U.S.C.A. § 1071.

2. CRIMINAL LAW

If government calls witness who has given testimony before grand jury, it is under duty to have transcript of such testimony available upon trial; and if it is then established at trial that witness testified before grand jury and defense counsel requests that trial court examine minutes

for inconsistency, trial court should read minutes and if any inconsistencies be found should make such portions of minutes available to defense counsel.

3. Criminal Law

If defense counsel calls witness who has testified before grand jury and believes that minutes may be necessary upon trial, appropriate arrangement should be made for their availability upon trial in event that counsel may ask for examination by trial judge.

4. Criminal Law

Inconsistencies between witness' testimony before grand jury and his testimony at trial need not first be established before court examination of grand jury minutes may be called for.

5. Criminal Law

In prosecution for harboring and concealing a federal fugitive, sufficient request was made to inspect grand jury minutes of testimony of government narcotics agent; but absence of any inconsistencies in testimony of witness rendered nonprejudicial failure to grant request.

6. Criminal Law

If no inconsistencies are found and there are no reversible errors, case should not be remanded because of failure of trial court to read minutes of grand jury before whom witness gave testimony.

7. Criminal Law

Trial judge sees witnesses, observes their manner of answering questions, and should be accorded discretion in determining methods which respective counsel seek to use in testing credibility of witnesses; and decision as to

whether minutes of grand jury should be made available to trial counsel can best be made at time by trial judge in light of all of circumstances presented during trial. 18 U.S.C.A. § 3500.

—o—

George J. Todaro, New York City (Sylvester Cosentino, New York City, on the brief), for appellant.

Paul J. Curran, Asst. U. S. Atty., New York City (S. Hazard Gillespie, Jr., U. S. Atty. for Southern District of New York, David R. Hyde, Asst. U. S. Atty., New York City, of counsel), for appellee.

Before LUMBARD, Chief Judge, and WATERMAN and MOORE, Circuit Judges.

LEONARD P. MOORE, Circuit Judge.

Defendant, David Giampa, was indicted for harboring and concealing Nicholas Tolentino, a Federal fugitive (18 U.S.C. § 1071). From a judgment of conviction after a trial without a jury, defendant appeals.

[1] The primary error asserted is that the Government failed to establish beyond a reasonable doubt that defendant knew that a warrant or process had been issued for Tolentino's arrest.

After hearing the proof, the trial judge concluded, "I entertain not the slightest doubt of his guilt, let alone a reasonable doubt, none whatsoever." There was no proof that defendant was shown the warrant for Tolentino's arrest or that he was specifically told that Tolentino was a fugitive from justice. Rare would be the case in which such direct proof would be available. The facts developed upon the trial, however, firmly support the judge's emphatic conclusion.

In October, 1958, Tolentino, a family friend, asked defendant to help him in locating an apartment. Defendant

did so to the extent of signing (using his own name "David Giampa"), a lease for him and having a telephone installed in the same name. This may have been a generous gesture towards a family friend but why did Tolentino assume the name "James Gianpa" and defendant use this false name for him in dealing with the apartment landlord? If Giampa thought Tolentino were altogether free to appear in public at will, why was it necessary for defendant to shop for and carry groceries to Tolentino's place of abode several times a week? And finally although it might be characterized as a crowning act of friendship, defendant's action in attempting to bar federal narcotics agents from entering the Tolentino (Gianpa) apartment with a simultaneous friendly warning, "Run, Nick. It's the Feds.," scarcely commends itself to being, as defendant's counsel argues, "as consistent with innocence as with guilt" or merely carrying "his good will too far for a friend." In summary, there was adequate proof from which the court could properly infer knowledge and guilt beyond a reasonable doubt.

Error is also attributed to the court's failure to inspect the Grand Jury minutes of the testimony of a government narcotics agent. While the agent was on the stand, the court after a proper foundation had been laid examined and ruled upon certain reports made by the agent, production of which had been requested. Defense counsel then asked that the court look at the Grand Jury minutes. The court ruled, "Motion denied. Jencks doesn't apply to grand jury minutes" (Pittsburgh Plate Glass v. United States, 1959, 360 U.S. 395, 398, 79 S.Ct. 1237, 3 L.Ed.2d 1323), adding later, however, that this ruling did not foreclose examination if a proper foundation were established. When the agent was subsequently recalled merely to identify a document, defense counsel argued that he was entitled to see the minutes.

The law as to the production and examination of Grand Jury minutes has been considered and made the subject

for discussion in a number of recent cases in this circuit on appeals from jury trials (United States v. Hernandez, 2 Cir., 1960, 282 F.2d 71; United States v. McKeever, 2 Cir., 1960, 271 F.2d 669; United States v. Zborowski, 2 Cir., 1959, 271 F.2d 661; United States v. Spangelet, 2 Cir., 1958, 258 F.2d 338; see also Jencks v. United States, 1957, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103; 18 U.S.C.A. § 3500) and in two other cases, like this one, where the case was heard below by the court sitting without a jury (United States v. Kirby, 2 Cir., 1960, 273 F.2d 956, and United States v. Santore et al., 2 Cir., 1959, 51 F.2d 290.

[2, 3] To avoid uncertainty in the future upon trials wherein this problem arises, certain fundamental principles should be observed. If the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial. If it is then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the Grand Jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel. If defense counsel calls a witness who has testified before a Grand Jury and believes that the minutes may be necessary upon the trial, appropriate arrangements should be made for their availability upon the trial in the event that counsel may ask for examination by the trial judge.

[4] In the past, claims have been made that inconsistencies first must be established (the so-called proper foundation) before a court examination of the minutes may be called for. This approach is quite unrealistic and would defeat the very purpose of the inspection. How can court or counsel know whether there is inconsistency or not unless the minutes are first read?

The practice set forth herein is simple, direct and best calculated to secure for the parties their rights to test the credibility of the witness before court or jury.

However, in this case there are differences of opinion in the court as to the facts and as to the procedure which should have been followed. Although they do not affect the ultimate result, they should be stated.

[5-7] Chief Judge Lumbard and Judge Waterman believe that the record sufficiently discloses a request to the trial judge to read the minutes and that, therefore, it was error for him to fail to do so. Chief Judge Lumbard believes that the error was not prejudicial because the examination of the minutes (by each member of this panel) discloses that there were no inconsistencies and that defense counsel would not have been entitled to the minutes in any event. For this point of view, he relies upon United States v. Kirby, supra. Judge Waterman would direct the trial judge to read the minutes and certify whether inconsistencies exist in the trial judge's opinion. In the event that the certificate indicated no inconsistencies, he would affirm. If the trial judge certified otherwise, he would remand for a new trial. For such procedure, Judge Waterman relies upon that adopted in United States v. Santore et al., 2 Cir., 1959, supra. Although Chief Judge Lumbard and the author of this opinion consider this procedure unnecessary, in deference to Judge Waterman's position we have submitted the transcript of the grand jury testimony to the trial judge below, and he has certified as follows:

> "The undersigned, in compliance with the request of the Court of Appeals for the Second Circuit in its order of January 30, 1961, certifies that there are no inconsistencies in the testimony of Martin Pera, the only witness who testified both in the trial of defendant and before the grand jury, sufficient to have warranted discovering to defendant's counsel the grand jury testimony of said Martin Pera."

In my opinion, the trial record does not disclose a request to read the minutes sufficiently clear or specific so that the trial judge can fairly be taxed with error for failing to do so. The remedial procedure suggested in Kirby and Santore should not be necessary in the future, if the practice suggested in this opinion is followed by the trial judges. For this reason, I think it is unnecessary to place a stamp of approval on either practice. Of course, if no inconsistencies are found and there are no reversible errors, the case should not be remanded because of failure to read the minutes. However, the decision as to whether the minutes should be made available to trial counsel can best be made at the time by the trial judge in the light of all the circumstances presented during the trial. The trial judge sees the witnesses, observes their manner of answering questions, and should be accorded discretion in determining the methods which the respective counsel seek to use in testing witness credibility.

The judgment of conviction is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964.

Criminal 134-63
No. 18,842

JOHN J. FRANK, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Criminal 134-63
No. 18,843

OLIVER W. ANGELONE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Criminal 134-63
No. 18,844

JOHN W. LEON, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Senior Circuit Judge, and Fahy and Wright, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that in the cases of John J. Frank and John W. Leon the judgments of the District Court are affirmed; and

(2) that in the case of Oliver W. Angelone the judgment of conviction is set aside and the case remanded to the District Court with directions to dismiss the indictment, unless the United States requests *within 15 days* an opportunity to present additional evidence to this court on the issue of mootness.

Per Circuit JUDGE FAHY.

Dated: April 22, 1965

Senior Circuit Judge Wilbur K. Miller concurs in affirmance of the convictions of appellants Frank and Leon but dissents from the disposition made by the court of the conviction of Angelone, which he would also affirm.

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PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	8
Brilliant v. *United States*, 297 F. 2d 385, certiorari denied, 369 U.S. 871	11
DeBinder v. *United States*, 292 F. 2d 737	10
Gordan v. *United States*, 299 F. 2d 117	10
Simmons v. *United States*, 308 F. 2d 324	10
United States v. *Bertucci*, 333 F. 2d 292, certiorari denied *sub nom. Doherty* v. *United States*, 379 U.S. 839	11
United States v. *Boyance*, 329 F. 2d 372, certiorari denied, *sub nom. Feldman* v. *United States*, 377 U.S. 965	11
United States v. *Giampa*, 290 F. 2d 83	11

Statutes:

47 U.S.C. 301	2
47 U.S.C. 318	2
47 U.S.C. 501	2
47 U.S.C. 502	2

790-412—65

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PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 573

JOHN J. FRANK AND JOHN W. LEON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a–9a) is reported at 347 F. 2d 486. The opinion of the district court (Pet. App. A, 10a–11a) is reported at 225 F. Supp. 573.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1965. A petition for rehearing was denied on July 30, 1965. On August 20, 1965, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including September 15, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence should have been excluded at trial on the ground that it was obtained by an illegal search and seizure.

2. Whether the trial court's refusal to make an *in camera* inspection of a government witness' grand jury testimony was, in the circumstances of this case, reversible error.

STATEMENT

Petitioners (along with co-defendant Angelone) were convicted by a jury in the United States District Court for the District of Columbia of the knowing use and operation of an electronic eavesdropping device in violation of 47 U.S.C. 301, 318, 501 and 502 (J.A. 35). Petitioners were sentenced to imprisonment for one year and fined $500 (J.A. 41). The court of appeals unanimously affirmed the convictions.

1. The evidence at trial showed that some time prior to March 31, 1962, a wireless microphone was delivered to Joseph W. Shimon, Inspector of the Metropolitan Police Department (J.A. 51–56, 58–63). On March 31, 1962, petitioner Frank reserved room 639 at the Mayflower Hotel for a Mr. D. P. Baxter (a fictitious name) (J.A. 71–76, 89). At about 2:00 p.m. on the same day, Douglas Weaver (an accomplice of petitioners who testified for the government at their trial) registered for that room under the name of D. P. Baxter and took the key to Frank and Angelone (J.A. 87–89, 98–99). Between 2:00 and 3:30 p.m., a maid at the hotel saw Frank come out of room

639, walk to suite 633, knock and enter.[1] About fifteen minutes later she saw petitioners Frank and Leon in the hotel corridor (J.A. 78–85). At about 4:00 p.m. Weaver returned to room 639, where he saw Frank, Angelone and Shimon, who was holding a wireless microphone and blowing into it (J.A. 90). Weaver remained in the room for about 15 minutes and left. When he returned about two and one-half hours later, Angelone and Frank were in the room and voices were being received through an FM device and a tape recorder (J.A. 92). Later that evening, Angelone and Frank pointed out Mr. Dungan to Weaver and informed him that Dungan represented El Paso in connection with litigation before the Federal Power Commission (J.A. 92–93). Weaver was in room 639 off and on each day from March 31 to April 4 (J.A. 93). Frank, Angelone and Weaver operated the electronic equipment until Monday, April 2 (J.A. 93). On that day, after mechanical difficulties were experienced, Leon came over to "straighten out things mechanically" (J.A. 93), and Weaver picked up two new devices (including a second FM receiver) at Leon's office and brought them to the hotel (J.A. 94). That evening, both petitioners, together with Angelone and Weaver, obtained

[1] Suite 633 (comprising rooms 633 and 634) was registered in the name of Malcolm Dungan, an attorney representing El Paso Natural Gas Company. He was not acquainted with petitioners. Beginning on April 1, 1962, and continuing into the week, several attorney-client conferences were held in suite 633 in preparation for hearings before the Federal Power Commission in which El Paso was involved (J.A. 100–102, 108–109, 118–120, 126).

information concerning "negotiations" over the electronic devices (J.A. 95). Angelone later informed the other three men that he had seen a private detective in the corridor. This caused some apprehension, and they quickly left for the night (J.A. 95). The finished reels of recorded conversations obtained during the five-day period from March 31 to April 4 were usually taken away immediately by Frank and Angelone (J.A. 95).

Meanwhile, at about 6:00 p.m. on April 2, 1962, the El Paso officials holding conferences in suite 633 became aware that they were under electronic surveillance.[2] Mr. Dungan brought in a private investigator, who discovered a wireless microphone taped to the cross-way supports underneath the coffee table in suite 633 (J.A. 104–105). At trial it was identified as appearing to be the same microphone that had been delivered to Shimon and was in his possession at the Mayflower Hotel on March 31 (J.A. 51–56, 58–63, 91).[3] On April 3, 1962, sounds of activities in suite 633 were heard coming from room 639 (J.A. 105, 114),

[2] Discovery of the eavesdropping was accidental. On April 1, an executive of El Paso passed by room 639 and heard radio communications, but thought nothing of it (J.A. 110). In the early evening of the next day, he again passed room 639 and this time heard the voice of the president of El Paso announcing a stockholders' and directors' meeting for the latter part of April (J.A. 111). The fact that an eavesdropping device had been planted in suite 633 was communicated to the rest of the conferees (J.A. 103–104, 110–111, 118–119).

[3] The wireless microphone was a transmitting device that required a license to operate (J.A. 189, 130, 138–159). Petitioners did not have such a license (Tr. 409–410).

and shortly afterwards petitioners were observed leaving 639 (J.A. 115).

2. On the afternoon of April 4, 1962, Mr. Dungan filed a civil complaint (Civil Case No. 1122–62) in the District Court and obtained a temporary restraining order (J.A. 106–107). Service of process was made on Angelone in room 639 that evening (J.A. 8, 21). Shortly afterwards, Angelone, accompanied by an unidentified woman, left carrying a traveling bag (J.A. 21, 116–117, 128). After a delay of unspecified duration, the assistant manager of the hotel, along with plaintiff's counsel in the civil action, entered the room. They saw no clothing or other signs of occupancy, although the radio receiver and tape recorder were still there (J.A. 22, 144). The hotel management then stamped the registration card "R.F.V." (room found vacant) and placed a security lock on the door of the room (J.A. 8, 22, 77–78, 144). Service of process in the civil action was made on Leon the next morning (J.A. 8). At a hearing the same day on his motion to quash process, his counsel disclaimed any interest in the equipment left in the hotel room (J.A. 9).[4] Plaintiff informed the court that the hotel manager considered the room vacated; that the hotel intended to remove the receiver and tape recorder from the room so that it could be rented again; but that the hotel did not want to be held responsible for the equipment (J.A. 22). Ac-

[4] At the time of this disclaimer, petitioners' counsel in both the civil and criminal proceedings (Mr. Carey) represented only Leon. Later in the afternoon, he was also retained by Frank to represent him in the civil action.

cordingly, the court issued an order impounding the equipment, and the order was executed a short time later by deputy marshals.

Before the impounding order was executed at the hotel, officials of the Federal Communications Commission, and plaintiff's counsel in the civil action, had, with the hotel manager's permission, entered room 639 for the purpose of examining the equipment left there; they were there for about five minutes before the marshals arrived. The extent of their examination was to turn the receiver on and listen to transmissions from the wireless microphone located in room 633 (J.A. 157–158). After being impounded, the equipment was placed in the marshal's safe at the courthouse (J.A. 144). Marshals later took the receiver to the Federal Communications Commission for a visual examination (J.A. 144, 154; Tr. 435–436, 449–450), and the receiver and tape recorder were also twice presented to a grand jury pursuant to valid subpoenas consistent with the impounding order (J.A. 9).

ARGUMENT

1. Petitioners' contention that the FM receiver and tape recorder should have been excluded from evidence at trial on the ground that they had been obtained illegally (Pet. 15–20) is without merit.

(*a*) Before trial, the district court denied a motion to suppress the equipment found in room 639, ruling that its seizure in connection with the civil case and subsequent use by the government in the grand jury investigation were not illegal. (Pet. App. A, 10a.) At trial, defense counsel brought out on cross-examina-

tion that FCC officials had entered room 639 about five minutes before the federal marshals arrived to impound the equipment under the court order issued in the civil case.[5] It is this conduct of FCC officials that petitioners now argue requires exclusion from evidence of the equipment (Pet. 15–16).[6] But no property was seized by the FCC officials, and no information was obtained resulting in government evidence.[7] Testimony as to the operating characteristics of the wireless microphone was properly admitted because it came, not from the observations of these officials on this occasion, but from extensive independent tests made subsequently on FCC equipment (J.A. 139–155). And since the equipment in room 639 came into the possession of the United States by way of the civil impounding order and subsequent subpoenas (not here challenged), and not through the observations of the FCC officials, it, too, was properly admitted.

(*b*) In any event, petitioners cannot complain about the entry into room 639, since, twenty-four hours after

[5] Although the government had advised defense counsel of this entry in its brief opposing the motion to suppress (J.A. 8), counsel claimed that he had not been aware of it until cross-examination at trial (J.A. 156–157).

[6] In the petition for certiorari, petitioners no longer challenge the validity of the civil impounding order, or subsequent delivery of the equipment found in room 639 to the grand jury pursuant to subpoena.

[7] The fact that FCC officials observed the receiver setting and dial, turned the receiver on, and heard transmissions from the "bug" in room 633 (J.A. 157–158) was developed by defense counsel on cross-examination, not by the government; it was no part of the government's case.

the security lock had been placed on the door, the hotel properly considered the room vacated and abandoned. In these circumstances, entry with permission of the hotel management clearly did not violate petitioners' constitutional rights. See *Abel* v. *United States*, 362 U.S. 217. Petitioners belatedly and without foundation argue that they never had an opportunity to present critical facts on the issue whether the room had been abandoned. But they had ample opportunity before and during trial to request a hearing on this issue, which the government had stressed at every stage of the proceeding. And on appeal petitioners noted and contested the government's argument that the room had been abandoned without ever suggesting that they were dissatisfied with the state of the record. Only after the issue had been decided against them did they complain, in a petition for rehearing, that they possessed additional facts relevant to the issue.[8]

[8] The additional facts that petitioners said they would show at a hearing were that Angelone's final departure from the room was at dinner time; that he was carrying an airline-type bag instead of a suitcase; that the bag belonged to the woman who left with him; and that he was taking her to the bus terminal. Pet. for rehearing, p. 4.

Petitioners' further contention that the FCC examination of the FM receiver without a court order about a week after it was impounded was an "illegal act" requiring exclusion of the equipment at trial (Pet. 18–20) has no merit. As noted by the court of appeals, such examination of articles properly in the custody of federal marshals was not an unlawful search and seizure and did not invade any personal or property rights of petitioners (Pet. App. A, 6a). Moreover, the admissibility of the equipment itself was unaffected by such examination; the obtaining of the equipment by the government was not the "fruit" of the examination but had an independent source in the impounding order.

2. Defense counsel demanded production of the minutes of Weaver's grand jury testimony, and the following ensued (Tr. 161–163):

> Mr. CAREY: I would think this, I recognize there is a particularized need to be demonstrated in order for a defense counsel to get the Grand Jury testimony of a witness.
>
> I would think that particularized need exists here for this reason: As I understand the cases the only reason to keep testimony before a Grand Jury from being divulged is to protect the witness, to have witnesses talk freely, freely in secret proceedings and that is not the situation here. This man was granted immunity and there is no further need for any secrecy after he once has been given the cloak of immunity to testify before the Grand Jury. I think that rule breaks down. I think on that basis we should have his Grand Jury testimony at this particular time.
>
> Mr. SULLIVAN: Your Honor please we submit there is no particularized need here whatsoever demonstrated by Mr. Carey's statement just now.
>
> * * * * *
>
> The COURT: The Court is required by salient court decisions to review the Grand Jury testimony in camera if it becomes necessary to determine whether there is any discrepancy between the Grand Jury testimony and the testimony given on the witness stand, and to determine from this review whether Grand Jury testimony should or should not be made available to the defense counsel.
>
> At the present time not having heard the cross-examination, I am not in a position to de-

> termine whether such in camera review is necessary. You may reserve your right to request it later.
>
> Mr. CAREY: Thank you.

These were the only references to Weaver's grand jury testimony; they show that defense counsel completely failed to demonstrate a "particularized need" for the grand jury minutes.* Moreover, contrary to petitioners' assertion (Pet. 7–8), counsel never requested an *in camera* inspection. His only request was for production without any preliminary inspection by the court. This Court has repeatedly declined to review decisions holding that, where no particularized need is shown, the trial court may refuse to inspect the

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* Even in the present petition, petitioners do not argue, nor could they, that they ever made a showing of a "particularized need" at trial. The nub of the concept of particularized need is whether an appraisal of the witness' trial testimony within the framework of the entire case indicates that further probing of the direct testimony is necessary. The nature of the charge, the significance and quality of the witness' trial testimony, and the existence of other corroborating witnesses, are important factors. See, *e.g.*, *Simmons* v. *United States*, 308 F. 2d 324 (C.A. D.C.); *Gordan* v. *United States*, 299 F. 2d 117 (C.A.D.C.); *DeBinder* v. *United States*, 292 F. 2d 737 (C.A.D.C.). In the instant case, the court of appeals noted that no inconsistencies appeared at trial and that adequate corroboration existed, and concluded that Weaver's trial testimony was not so critical or fundamental to the prosecution as to give rise to a particularized need that the court examine the minutes (Pet. App. A, 6a). Petitioners' present assertion that Weaver's testimony at trial contradicted that of another government witness (Pet. 15) is incorrect.

grand jury testimony of a government witness,[10] even though the Court of Appeals of the Second Circuit has ruled otherwise. See, *e.g.*, *United States* v. *Giampa*, 290 F. 2d 83, 85. There is assuredly no occasion to review the question in the present case, where, in view of counsel's failure to request such inspection, it is not properly presented.

Petitioners seek support from the fact that parts of Weaver's grand jury testimony were disclosed to defense counsel in the subsequent trial of Shimon for violations of the Federal Communications Act arising out of the same incident (Pet. 8, 15). But Weaver's grand jury testimony, as revealed at Shimon's trial, contained no material inconsistencies with his testimony at petitioners' trial;[11] and the fact that Shimon

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[10] See, *e.g.*, *United States* v. *Bertucci*, 333 F. 2d 292 (C.A. 3), certiorari denied *sub nom. Doherty* v. *United States*, 379 U.S. 839; *United States* v. *Boyance*, 329 F. 2d 372 (C.A. 3), certiorari denied *sub nom. Feldman* v. *United States*, 377 U.S. 965; *Brilliant* v. *United States*, 297 F. 2d 385 (C.A. 8), certiorari denied, 369 U.S. 871.

[11] These alleged inconsistencies were outlined in the petition for rehearing, pp. 8–9, as follows:

> Q. Now when you went over the bellhop took you up to the hotel room itself. Did you have any baggage with you at that time? A. Just a brief case which I took down again. Q. You did not carry any electronic equipment to the room then, is that correct? A. No, sir. Q. How soon after that did you see Frank or Angelone again? A. Well I went back there I guess it was about 6:00 or 6:30.

Also that Shimon was running the monitoring equipment in room 639 on Saturday, March 31, 1962; that Weaver saw Shimon in room 639 on two occasions; that Weaver left the key to room 639

established a particularized need for that testimony at his trial (where Weaver was the only witness placing Shimon at the hotel, and Shimon took the stand and denied being at the hotel on the pertinent dates) surely is not controlling here, where no particularized need was alleged or shown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

OCTOBER 1965.

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at the desk after he registered and Frank and Angelone picked it up there; and that Shimon had the "thing" in his hand in room 639 on the "second" day.

Such inconsistencies as are apparent are minor. Weaver did testify in petitioners' trial that he saw Frank and Angelone about 6:00, though he also said he saw Frank, Angelone and Shimon about 4:00 p.m. The omission in petitioners' trial of testimony that he saw Shimon twice is not surprising since the trial did not involve Shimon. Whether Weaver gave the key to Frank and Angelone or left it at the desk for them to pick up is not material.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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